United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 8, 2006

TO : Victoria E. Aguayo, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Western Medical Center
Case 21-CA-37362
California Nurses Association
(Western Medical Center)
Case 21-CB-14123

These cases were submitted for advice as to whether the Employer and the Union violated the Act by maintaining a pre-recognition agreement that, by its terms, provides for: (1) recognition based solely on a majority of voting employees; and (2) application of a pre-negotiated contract, where the Union has made it clear that it will not apply either of these provisions. We conclude that the instant charges should be dismissed, absent withdrawal, given the Union's demonstrated commitment not to apply the disputed provisions.

Initially, we agree with the Region that the allegation regarding the agreement's recognition provision should be dismissed, absent withdrawal. In a previous memorandum, we concluded that an employer violated Section 8(a)(2), and a union violated Section 8(b)(1)(A), when recognition was granted and accepted based upon the results of a private election in which the union did not receive the votes of a majority of the unit, even though the union received the votes of a majority of employees voting in the election.[1] Here, in contrast, no recognition has been granted or accepted, no private election has been held, and no private election is likely to ever be held because the Union has committed to invoke only the Board's consent election process, as it has the unilateral discretion to do under the parties' agreement, rather than holding a private election. Under these circumstances, in agreement with the Region, we would not issue complaint attacking the mere

[1] Whittier Hospital Medical Center, Case 21-CA-36404, Advice Memorandum dated January 4, 2005, pp. 3-6.

maintenance of the parties' private election recognition provision.[2]

We further conclude that the allegation regarding the agreement's application-of-contract provision should similarly be dismissed, absent withdrawal, based on the Union's demonstrated commitment not to apply the disputed provision. We recognize that we have concluded that pre-recognition agreements in which an employer and a union agree to terms and conditions of employment that would apply to employees if the union obtains majority status violate Section 8(a)(2) and 8(b)(1)(A),[3] because premature contract negotiation affords the minority union "a deceptive cloak of authority with which to persuasively elicit additional employee support," thereby tainting any employee support the union subsequently obtains.[4] Nonetheless, in at least one case, we dismissed a similar charge because the charged parties' willingness to nullify the disputed application-of-contract provision essentially rendered moot the concerns raised in Majestic Weaving.[5]

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[2] Of course, if: (1) the Union were to breach its commitment to invoke a Board consent election; (2) the parties were to hold a private election; and (3) recognition were to be granted without a showing of majority support, complaint should issue at that time, consistent with the rationale set forth in our Whittier Hospital Medical Center memorandum.

[3] See, e.g., Thomas Built Buses, Case 11-CA-20038, Advice Memorandum dated September 17, 2004 (finding 8(b)(1)(A) and 8(a)(2) violation where, in a neutrality agreement, a union agreed to provisions concerning guaranteed transfer rights, severance in the event of layoff or plant closure, strikes and subcontracting prohibitions, and restrictions on overtime, to be effective should the union obtain majority status).

[4] See, e.g., Plastech Engineered Products, Inc., Case 10-CA-35554, et al., Advice Memorandum dated June 27, 2005, quoting International Ladies' Garment Workers' Union (Bernhard-Altmann Texas Corp.) v. NLRB, 366 U.S. 731, 736 (1961).

[5] Tenet Healthcare, Inc. d/b/a Los Gatos Community Hospital, et al., Case 32-CA-21266-1, et al., Advice Memorandum dated February 23, 2005. We reached this conclusion even where the Union had relied extensively on the putative contract

Likewise, the Union's commitment not to enforce or apply the application-of-contract provision makes dismissal appropriate here. We particularly note the Union's past willingness to disavow the disputed provision, its continuing acknowledgement of the provision's problematical legal status, even having gone so far as to invoke arbitration and argue the provision's unenforceability to the arbitrator,[6] the Union's current commitment not to enforce the provision if it achieves representative status, and the fact that the parties have not relied on the application-of-contract provision in the organizing campaign, thus minimizing any concerns that the provision affords the Union the "deceptive cloak of authority" that would be at the heart of a Section 8(a)(2)/8(b)(1)(A) violation. Therefore, we conclude that, under the current facts, this case is not an appropriate vehicle to present an alleged Majestic Weaving allegation to the Board.[7]

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in its organizing campaign, as the Union had agreed to notify all unit employees in writing that the provision has been rescinded.

[6] We recognize that the arbitrator declined to excise the provision from the parties' agreement in the absence of clearer authority that it was unlawful. The arbitrator did, however, make it clear that such a remedy would be appropriate if the provision is ultimately determined to be unlawful. In any case, it is well established that the Board will not defer to an arbitrator's award that is "clearly repugnant to the purposes and policies of the Act" or "palpably wrong." See generally Olin Corp., 268 NLRB 573 (1984).

[7] If the Union ultimately achieves representative status, and either party attempts to enforce the application-of-contract provision, or refuses to bargain based on it, the Region should submit any 8(a)(2), 8(a)(5), 8(b)(1)(A), or 8(b)(3) charge for advice at that time.

Accordingly, the Region should dismiss the instant charges, absent withdrawal.

B.J.K.